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Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1779

GEORGE D. OWEN,

Petitioner,

—against—

THE CITY OF INDEPENDENCE, MISSOURI, et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE

OSCAR G. CHASE
NANCY STEARNS
GREGORY ABBEY
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

BRUCE J. ENNIS
CHARLES S. SIMS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, N.Y. 10016

STEVEN R. SHAPIRO
ARTHUR N. EISENBERG
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization of approximately 200,000 members. The New York Civil Liberties Union is its state-wide affiliate operating in New York State. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied in the Bill of Rights.

This case is of special interest to the Civil Liberties Union because its principal issue - whether municipalities may invoke a good faith defense to actions brought under 42 U.S.C. §1983 - will largely determine whether a meaningful remedy is available to victims of unconstitutional governmental policy. Moreover, the ACLU and the NYCLU are raising the same legal issue before the Court in their capacity as counsel to the petitioners in Sala v. County of Suffolk, No. 79- , petition for writ of certiorari pending. The facts in Sala underscore the practical importance of the novel legal question now presented to the Court.

Specifically, the County defendant in Sala successfully invoked a good faith defense to escape liability for an "insensitive, demeaning and stupid" strip-search policy conducted in violation of the Fourth Amendment. The strip search procedures at issue were routinely applied to all

*Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

pre-arraignment detainees regardless of the charge they faced or whether there was any suspicion that a particular detainee possessed dangerous weapons or illegal contraband. The record in Sala clearly demonstrated that the searches were unnecessarily intrusive, and the district court agreed.

However, despite her victory on the merits of her claim, petitioner in Sala was denied any monetary relief on the ground that the defendants, including the County, had acted in good faith. As its sole reason for affording that defense, the court noted that no settled authority had previously found the particular type of search at issue to be unconstitutional. That ruling was affirmed by the United States Court of Appeals for the Second Circuit. If this Court upholds a municipal good faith defense in the instant action, petitioner in Sala will be left without redress despite the district court's finding that her constitutional rights were grossly abused by an official County policy which was enacted without thought and implemented without regard to individual privacy interests.

The Center for Constitutional Rights is a non-profit organization devoted to litigation protective of rights under the Constitution. The issue of governmental immunity from liability under 42 U.S.C. §1983 is of immediate significance for many of the Center's clients, including the plaintiff class in Monell v. Department of Social Services of the City of New York, 436 U.S. 412 (1978). Plaintiffs in Monell are now seeking back pay as a result of New York City's unconstitutional policy of

requiring mandatory pregnancy leaves.

Following this Court's remand in Monell, plaintiffs have engaged in protracted settlement negotiations with counsel for the City of New York in an effort to compromise the class claims. Unfortunately, this effort has failed and litigation has been resumed. The City of New York has made it clear that its principal defense is its claimed good faith in promulgating and applying the challenged pregnancy leave rules. As a result, the Monell plaintiffs have a direct interest in the question presented by the instant case, and their success or failure may well turn on the result reached here. Monell presents a factual setting illustrative of a particular interaction between law and municipal policy-making which is not present in Owen but which should be taken into account by this Court in determining whether a good faith defense exists for municipalities, and, if it does, in describing its contours.

Amici will argue that the facts underlying Sala and Monell specifically, and §1983 actions against municipalities generally, evidence the inappropriateness of adopting a broad good faith immunity for municipalities under 42 U.S.C. §1983.

ARGUMENT

I. CREATION OF A GOOD FAITH DEFENSE OR OTHER SPECIAL IMMUNITY DEFENSE FOR MUNICIPALITIES WOULD BE INCONSISTENT WITH CONGRESSIONAL INTENTION IN ENACTING §1983, AND WOULD UNDERMINE IMPORTANT POLICY CONSIDERATIONS.

It is undisputed that neither the text nor the legislative history of 42 U.S.C. §1983 expressly establish a good faith or other special immunity defense for municipalities. The question, then, is whether the judiciary should create a defense which Congress has not expressly established. In answering that question, the Court should review the legislative history of §1983 to determine whether creation of such a defense would further, or frustrate, Congressional objectives, and should determine whether creation of such a defense would advance, or undermine, other important policy considerations.

A. Judicial Creation of a Special Defense For Municipalities Would Frustrate Congressional Objectives.

At the time Congress enacted the Civil Rights Act of 1871, the common law did not confer a special immunity on municipalities who were amenable to suit. This fact was certainly known to Congress and nothing in the legislative history of §1983 suggests that Congress intended to change this common law rule, a point carefully documented in the amicus brief submitted in this case by the Lawyers Committee for Civil Rights Under Law and the National Education Association, which amici adopt.

But even if Congress had not so clearly rejected establishment of a special immunity defense, it is undeniable that judicial creation of such a defense would frustrate Congressional objectives in enacting §1983. As this Court acknowledged in Monell, the 1871 Civil Rights Act is a "remedial" statute.1/ The overriding objective of the 42nd Congress was to create a remedy for violation of federally protected rights, including, specifically, a damages remedy against municipalities. Monell at 684 . Judicial creation of a special immunity defense for municipalities would certainly frustrate that objective. It would be inappropriate, on both legislative interpretation and separation of powers grounds, for the judiciary to take back what Congress sought to grant. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) Congress had, and has, the power to establish such a special defense if it chooses to do so. And given the clearly remedial objectives of §1983, creation of such a defense is a matter for Congress, not the courts, to decide.

1/Proponents of the 1871 Civil Rights Act repeatedly described it as a "redress for wrongs," correcting the lack of a "remedy" and urging that it was "the duty of the national government. . .to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." CONG. GLOBE, 42d Cong., 1st Sess. 368(1871)(remarks of Rep. Sheldon). See generally E. Schnepper, "Civil Rights Litigation After Monell" 79 Col. L.Rev. 213, 243-244 (1979).

B. Jucidial Creation of a Special Defense For Municipalities Would Undermine Important Policy Considerations.

Although general tort law principles are certainly relevant, it must be remembered that §1983 provides a remedy only for violations of constitutional or other federally protected rights. Given our heritage, the need to compensate and deter such constitutional torts should be even more apparent, and more compelling, than in a non-constitutional context.

If it is appropriate for municipalities to think carefully before adopting policies that might violate ordinary rights, it is even more critical that municipalities think carefully before adopting policies that might violate constitutional rights. Similarly, although the risks of liability should not be so great as to preclude municipalities from acting at all, it is appropriate that the scope of any deterrent effort be broader when a contemplated policy might violate constitutional rights than when it might violate lesser rights.

It has always been thought to be sound policy to provide "an incentive to shun practices of dubious legality," particularly when those practices might violate constitutional rights. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). A special immunity defense for municipalities would seriously undercut that socially useful deterrent effect, and would encourage municipal indifference to or disregard for the consequences of municipal policies. See Note, "The Discretionary Exception and

Municipal Tort Liability: A Reappraisal," 52 Minn. L. Rev. 1047, 1057 (1968).

Thus, important policy considerations would be undermined by creating a special immunity defense for municipalities. The countervailing policy considerations which support a "good faith" defense for the acts of individuals do not apply to the policies of municipalities.

Judicial creation of a good faith defense for individual public officers has been justified on two grounds:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his office, to exercise discretion;
>
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Neither of these rationales justifies creation of a special immunity defense for municipalities.

As the Second Circuit correctly noted in Sala, the first rationale - the injustice of imposing damage awards on individuals who are under a legal obligation to act - is completely inapplicable to municipalities. The municipality sued for promulgating an unconstitutional policy is not in the position of an officer whose

only choice is to ignore a municipal policy and be "charged with dereliction of duty" or to enforce that policy and be "mulcted in damages." Pierson v. Ray, 386 U.S. 547, 555 (1967). Unlike the officer, the municipality has the power to change its policy.

Contrary to the Second Circuit's view in Sala, the second rationale - avoiding undue deterrence in decision-making - is equally inapplicable to municipalities. Such considerations are peculiar to personal liability.2/

Under Monell, municipalities are not liable for their acts, even if unconstitutional, but only for their policies. And careful deliberation is the essence of the policy-making function. Unlike the individual, who frequently must act immediately if he or she is to act at all, and who may be unduly deterred from acting because of an unfounded fear of liability which time for reflection and consideration would dispel, municipalities engaged in the policy-making process will not be deterred by fears of liability which, upon

2/See Carter v. Carlson, 447 F.2d 358, 367 n. 27 (D.C.Cir. 1971), rev'd on other grounds sub nom. District of Columbia V. Carter, 409 U.S. 418 (1973) ("With respect to some government functions, the threat of individual liability would have a devastating effect, while the threat of government liability would not significantly impair performance.") See also 3 K. Davis, Administrative Law Treatise at 830, 863-866 (1970).

reflection, seem unfounded.3/ On the other hand, if the contemplated policy seems, upon reflection, to present a realistic risk of liability, it is then appropriate that the municipality consider alternative policies, or abandon the contemplated policy entirely.

Accordingly, the policy considerations which justify a special defense for individuals do not justify such a defense for municipalities engaged in the deliberative policy-making process.

3/ The line police officer does not have time to request legal advice before arresting a criminal suspect; the municipality does have time to request such advice before adopting the policy which serves as the authority for the arrest. It should be equally obvious, however, that a municipality cannot escape liability by merely solicitinga pro forma opinion from its attorney. That result would completely negate the remedial promise of §1983 and discourage, rather than encourage, a deliberative process which places a proper premium on individual rights.

II. ANY SPECIAL IMMUNITY DEFENSE FOR MUNICIPALITIES SHOULD BE MORE LIMITED THAN THE GOOD FAITH DEFENSE AVAILABLE TO INDIVIDUALS.

Although amici have unusually extensive experience in §1983 litigation, we have found it difficult to construct an immunity formulation that would accomodate the arguably special interests of municipalities without effectively undermining Monell and the objectives of §1983. But though it is difficult to decide, almost in the abstract, what such a special defense should be, it is much easier to decide what it should not be. For the reasons expressed in Point IIA, we think it clear that any special immunity defense for municipalities should not be the equivalent or substantial equivalent of the good faith defense available to individuals. And in Point IIB, we discuss other general considerations that would have to be reflected in any special defense for municipalities.

A. The Good Faith Defense Available To Individuals Is Not Appropriate For Municipalities, And If Extended To Municipalities Would Effectively Overrule Monell.

The Eighth Circuit in this case, and the Second Circuit in Sala, unjustifiably extended to municipalities the same good faith defense available to individuals. Those decisions cannot be sustained.

First, as we noted in Point I, the reasons which justify a good faith defense for the spontaneous acts of individuals who are under a legal obligation to act,

and often to act quickly without time for deliberation, do not apply at all to the more discretionary and deliberative policy-making process of a municipality. Because the roles and responsibilities of the policy-maker and the policy-implementor are very different, a special defense that is appropriate for one cannot be fully appropriate for the other.

Second, extending to municipalities the same good faith defense available to municipal employees would effectively "drain [Monell] of meaning." Monell, 436 U.S. at 701, and would transform the very basis for municipal liability - where a "policy" has "caused" and is "responsible" for constitutional injury - into a justification for immunity for all defendants.

With very few exceptions, a municipal line officer implementing an official policy will almost always be afforded an individual good faith defense. See generally, Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501 (1977). Similarly, policymaking officials are granted a broad personal immunity reflecting their discretionary duties. See Scheuer v. Rhodes, 416 U.S. 232, 246 (1974). Thus, both the policy officer and the police commissioner will usually be immune if they acted pursuant to an official policy. Because a municipality can act only through its agents, creating a municipal immunity that is co-extensive with the individual immunity of municipal employees would effectively create an "absolute" immunity for municipalities, a result expressly precluded by Monell, 436 U.S. at 701, and directly contrary to the interest of the 42nd Congress.

It would at least be arguable, though we think not persuasive, to provide derivative immunity when the liability of the governmental entity is itself derivative.4/ But in Rizzo v. Goode, 423 U.S. 362, 371-372 (1976), and again in Monell, 436 U.S. at 694, this Court interpreted §1983 to preclude derivative or respondent superior liability. Since municipalities can be found liable only for their own policies, not for the acts of their individual employ-es, there is no justification for providing a derivative immunity to municipalities in §1983 litigation.

B. Any Special Immunity Defense For Municipalities Should Be Carefully Constructed To Protect Constitutional Rights.

In order to protect the remedial purposes of §1983, any special immunity defense for municipalities fashioned by this Court should be directed toward structuring the decision-making processes of municipalities in a manner most likely to safeguard fundamental constitutional rights. Thus, while it may not be sufficient, it is certainly necessary that municipalities consider the individual interests likely to be affected by their policies and less intrusive ways of meeting municipal goals.

The immunity test should also make clear that the absence of prior and binding judicial precedent will not automatically entitle the municipality to immunity. The almost infinite variety of policies that

4/ Cf. Norton v. United States, 581 F.2d. 390 (4th Cir.), cert. denied, 47 U.S.L.W. 3391 (Dec. 5, 1978.)

could be adopted, and the almost infinite variety of individual interests that could be affected by such policies, make it highly unlikely that the legality of any particular policy, as it affects a particular individual interest, will previously have been determined by the Supreme Court, or perhaps by any court.

Of course, if the Supreme Court had previously decided that a similar policy violated federal constitutional principles, a municipality which continues or adopts that policy, in the face of the Supreme Court's decision, should be held liable for damages.

Simiarly, if a municipality pursues an official policy following a decision declaring a similar policy unlawful by a lower court or administrative agency having jurisdiction over it, as in Monell, the municipality should be liable for damages. As a matter of law, a municipality can fairly be presumed to have knowledge of relevant decisions by tribunals with jurisdiction over it. If a municipality continues its policy in the face of those decisions, it must proceed at its own risk. Any other result would totally undermine the adjudicatory authority of the lower federal courts, the state courts, and the state and federal administrative agencies, thereby encouraging municipal recalcitrance.

Correspondingly, the weight and precedential value of decisions in other jurisdictions are relevant factors in determining a municipality's liability for damages. Ordinarily, however, when a federal court in any jurisdiction has held a similar policy unlawful, a municipality should be required to proceed at its own risk in

applying that policy.

Even if no court or administrative agency had previously found a similar policy unlawful, a municipality should not necessarily be immune.

For example, when the text of the Constitution itself makes it apparent that the municipality's policy affects fundamental rights clearly protected by the Constitution, it is surely unreasonable for the municipality to be protected by a blanket immunity merely because there was no prior judicial precedent directly on point. Thus, in Sala, the County necessarily knew that its policy of routinely strip-searching all detainees clearly implicated constitutional rights and might be found to violate those rights. In such cases, conditioning municipal liability on the existence of prior judicial precedent would encourage municipal indifference to constitutional rights, and would therefore frustrate the Congressional objectives reflected in §1983.

Thus, the Eighth Circuit in this case, and the Second Circuit in Sala, erred in relying on the absence of prior on-point precedents from this Court as a justification for imposing an absolute immunity. Accordingly, even if the Court does not accept the principles enumerated in Point I of this brief, the case must nonetheless be remanded for further consideration in light of the considerations discussed in Point II of this brief.

CONCLUSION

The decision of the Eighth Circuit should be reversed and this Court should hold that municipalities may not invoke a special immunity defense in §1983 actions. In the alternative, this Court should hold, along the lines suggested in this brief, that any special immunity defense available to municipalities in §1983 actions is more limited than that applied by the Eighth Circuit below and should accordingly remand this case for further consideration.

Respectfully submitted,

BRUCE J. ENNIS
CHARLES S. SIMS
American Civil Liberties
Union Foundation
22 East 40th Street
New York NY 10016

STEVEN R. SHAPIRO
ARTHUR N. EISENBERG
New York Civil Liberties
Union
84 Fifth Avenue
New York NY 10011

OSCAR G. CHASE
NANCY STEARNS
GREGORY ABBEY
Center for Constitutional
Rights
853 Broadway
New York NY 10003